IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY WARD	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-5996
MERCK & CO., INC.	:	

MEMORANDUM ORDER

AND NOW, this 6th day of January, 2006, upon consideration of the Motion In Limine filed by Plaintiff Gary Ward (Doc. No. 20), it is ORDERED that the Motion is DENIED.

In this Motion, Plaintiff seeks to exclude evidence: (1) that he voluntarily submitted to a pre-employment physical in 1996; (2) of his treatment at Doylestown Hospital in October 2002; (3) of his treatment by Dr. Jonathan Beck, his primary care physician, in October 2002; (4) of his treatment at Central Montgomery Medical Center in February 2003; (5) of his treatment by Josephine Dr. Pobre-So; (6) of his treatment by Dr. Esther Kamisar; (7) of anecdotal reports of his behavior made by witnesses other than Robert Sitrin, Michael Washabaugh, Steven Cohen, Joye Minisci, Lori Keller, and Brent Oswald; and (8) of Plaintiff's mental status between October 2002 and July 2003, which is not based on direct observation by testifying witnesses. (Doc. No. 20.)

Plaintiff argues that evidence of his pre-employment physical should be excluded because the ADA establishes different standards for pre- and post-employment physical examinations. *See* 42 U.S.C. §§ 12112(d)(2)-(4). Plaintiff objects to the other evidence on the basis that it was not known by Merck at the time when Defendant required Plaintiff to submit to a fitness-for-duty evaluation and when his employment was terminated. Plaintiff argues that this evidence is not relevant under Rule 401 and is thus inadmissible under Rule 402. *See* Fed. R. Evid. 401

("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."). Plaintiff also implies that even if this evidence were relevant, its probative value is substantially outweighed by its prejudicial effect, and it should therefore be excluded under Rule 403. *See* Fed. R. Evid. 403.

We are satisfied that Plaintiff's pre-employment physical is relevant to the issue of whether Defendant has a well-considered and consistent policy for dealing with the welfare of its employees. Plaintiff raises this exact issue in his submissions. (Doc. No. 11 at 21 ("The absence of any well considered policy is clearly at the root of this problem.").) The mere fact that the ADA applies a more lenient standard to employment entrance examinations, 42 U.S.C. § 12112(d)(3), than it does to post-employment physicals does not render the existence of pre-employment examinations irrelevant.

With respect to the other categories of evidence, Plaintiff argues that Defendant did not rely on any of this evidence to justify its requirement that Plaintiff submit to a medical examination. This is true. Merck's decision was based entirely on Plaintiff's observable behavior as communicated to Drs. Nigro, Washabaugh, and Cohen. However, this evidence—Plaintiff's treatment for mental health issues, observations of Plaintiff's behavior made by other individuals, and Plaintiff's own recollection as to his mental status—does make more probable facts that will be in issue, for example, the fact that Defendant's employees did observe Plaintiff behave in an odd or unusual manner.

The evidence found objectionable by Plaintiff reveals that Plaintiff had been diagnosed

with possible schizophrenia and anxiety disorder. He was prescribed medication to treat anxiety and instructed to seek treatment from mental health professionals. Police officers believed Plaintiff's unusual behavior on February 19, 2003 warranted a visit to a local hospital for evaluation. Plaintiff believed that his computer was being monitored. Plaintiff submitted his resignation and then retracted it, failing to provide any reason for his decision to leave the company. Finally, after Plaintiff's return from medical leave, multiple employees observed his odd, even frightening, demeanor.

Clearly, this evidence makes more probable the fact that Plaintiff's behavior, as personally observed by colleagues and known to Drs. Cohen, Washabaugh, and Nigro, caused Defendant to question whether Plaintiff could continue to perform the duties of his position. As such, this evidence is relevant. Moreover, we are satisfied that the prejudicial effect of this evidence does not substantially outweigh its probative value. Accordingly, Defendants should not be precluded from offering this evidence.

BY THE COURT:

S:/R. Barclay Surrick, Judge